



# TRIBAL AIR NEWS

## WEEKLY UPDATE

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### **EPA Fits Fugitive Emissions with NSR**

A November 13th *Federal Register* proposal by the U.S. Environmental Protection Agency (EPA), if adopted, will forever clarify when and how fugitive emissions are considered with respect to the major new source review (NSR) program. As part of this proposal, the EPA also intends to add clarity to how fugitive emissions should be treated by minor NSR programs including those located in Indian country.

The major NSR program, which is a preconstruction review and permitting program applicable to new or modified major stationary sources, is outlined in parts C and D of Title I of the Clean Air Act (CAA). Section 302(j) of the CAA defines a “major” source as one that emits or has the potential to emit more than 100 tons per year of any air pollutant, which would also include quantifiable fugitive emissions.

In 2002, the EPA issued an NSR Improvements Rule that held all sources need to include fugitive emissions in determining whether a proposed construction activity or an operational change qualifies as a major source modification subject to NSR. Under its current proposal, the Agency would only require those sources listed as part of the 28 categories under 40 C.F.R § 52.21(b)(1)(iii), along with sources having plant-wide applicability limits (e.g., PALs), to consider fugitive emissions with respect to major source modifications. In the end, agricultural and mining operations would also not be required to count fugitive emissions, such as windblown dust, toward major modifications leading to increased emissions.

The EPA is also considering how fugitive emissions should be treated under existing state and local minor NSR programs. Among the options that the Agency is considering are requiring minor sources to include fugitive emissions for all sources to the extent that they are quantifiable; include fugitive emissions only for source categories listed pursuant to section 302(j) of the CAA; or exclude fugitive emissions for all sources. Whatever option is adopted, the Agency will incorporate it into the forthcoming tribal minor NSR rule, an important matter which may warrant comment by tribes and their representatives.

While fugitive emissions are the focus of the proposed rule, consultation with tribal governments always remains a factor. Whenever any rule is proposed, the EPA makes an assertion as to whether Indian country is affected to the extent that consultation and

coordination with Indian tribal governments is required in accordance with Executive Order 13175. As for the rule at hand, the EPA claims that its proposed changes will benefit reviewing authorities for facilities and the regulated community, including those located on or near tribal lands, by providing certainty as to when fugitive emissions should be accounted for under the NSR program. The EPA also claims that tribes will not be unduly burdened by the rule as the EPA is currently the NSR reviewing authority in Indian country. In the long run, however, tribes could be impacted if and when they obtain delegated authority of the major NSR program for their respective jurisdictions. As such, tribes and their representatives are advised to closely look over the proposed rule to discern if any comments are warranted on their behalf, particularly with respect to consultation.

With the rule now published in the *Federal Register*, comments may be officially submitted through January 14, 2008. To read the proposed rule in full and to learn how to submit comments, please go to <http://www.epa.gov/fedrgstr/EPA-AIR/2007/November/Day-13/a22131.htm>.

### **Federal Fuel Standards Thrown Out by Court**

A November 15th court ruling has placed the federal government on notice that its current fuel economy standards for light trucks need to be changed. The question is whether this court's ruling or legislative action will force the change.

The National Highway Transportation Safety Administration (NHTSA) is tasked by the Energy Policy and Conservation Act (EPCA) to set and amend corporate average fuel economy (CAFÉ) standards. In April 2006, the NHTSA issued a rule increasing CAFÉ standards for light trucks by 2.4 miles per gallon (mpg) by 2011, effectively increasing these standards to about 24.1 mpg. The 2006 standards were the first of their kind to establish separate CAFÉ standards based on vehicle size which is contrary to the "one size fits all" system used on previous occasions. Eleven states, four environmental organizations, and two major cities subsequently filed a lawsuit in the 9th Circuit Court of Appeals (see *Center for Biological Diversity v. National Highway Transportation Safety Administration*, 9th Cir., No. 06-71891 (November 15, 2007)), claiming that the NHTSA increases were far below what was economically and technologically feasible.

In a sweeping decision, the court held that the NHTSA violated the EPCA in four key areas. First, the NHTSA failed to consider the economic benefits of reduced carbon emissions. While the NHTSA argued that it could not place an "explicit valuation" on carbon emissions, the court found that the Administration had provided a range of values for carbon dioxide emissions; offered up monetary valuations for a number of related benefits such as reduced air pollution; and gauged employment and sales impacts due to more stringent standards being imposed upon vehicle manufacturers. The court further found that the NHTSA was required to consider greenhouse gases under the National Environmental Policy Act in accordance with the *Massachusetts v. EPA* 2006 Supreme Court decision. Second, the NHTSA failed to establish new CAFÉ standards for all light trucks weighing between 8,500 and 10,000 pounds. Third, NHTSA failed to establish a "backstop" to prevent vehicle manufacturers from decreasing their overall CAFÉ averages

by producing a great number of the larger vehicles not covered by the new CAFÉ standards. Fourth, the NHTSA failed to revise the passenger automobile/light truck classifications, understanding that some light trucks now actually serve as passenger vehicles.

The court further held that the NHTSA should have conducted an environmental impact statement (EIS), but fell short of its responsibility by only completing an environmental assessment that found no significant impact due to revised light truck standards. An EIS, however, would have helped to identify more stringent alternatives to the light truck standards that ended up being adopted by the EPA.

Based on the aforementioned findings, the court remanded the case back to the NHTSA, requiring the Administration to promulgate new CAFÉ standards as “expeditiously as possible and for the earliest model year practicable.” As it is, existing light truck standards are set to run through 2011. Furthermore, the Senate and House of Representatives are trying to reach a compromise on energy legislation that could include CAFÉ standards as high as 35 mpg by 2021. With this said, the NHTSA may end up reacting to Congress before it ever addresses what the court has requested.

To read the court’s opinion along with its findings, please go to  
[http://www.ca9.uscourts.gov/ca9/  
newopinions.nsf/775202DBA504085C88257393007B9729/\\$file/0671891.pdf?  
openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/775202DBA504085C88257393007B9729/$file/0671891.pdf?openelement).

### **SEPs Legislation for Diesel Retrofit Projects Likely to Pass in 110th Congress**

Legislation has been anything but easy to pass during the 110th Congress, a Congress that promised significant change from its early beginnings. Fortunately, one piece of air legislation is likely to pass that could benefit tribes as well as others considering diesel retrofit projects.

A lot of resources have recently been thrown toward diesel retrofit projects, a great means for reducing harmful air pollutants. The Diesel Emissions Reduction Act, for example, authorizes \$200 million a year for five years to undertake these projects. The extent of such resources also led the U.S. Environmental Protection Agency (EPA) to remove diesel retrofit projects as the type eligible for monies generated through supplemental environmental projects (SEPs). A SEP provides an opportunity to direct fines and penalties for environmental violations toward beneficial environmental uses.

A number of Senators and House Representatives from both the Democratic and Republican parties, however, have communicated their displeasure in EPA’s action and have subsequently crafted legislation which would allow SEPs to be used for diesel retrofit projects as part of a settlement of an environmental violation if such projects protect human health or the environment; are related to the underlying alleged violations; do not constitute activities that the defendant would otherwise be legally required to perform; and do not provide funds for the staff of the Agency or for contractors to carry out the Agency’s internal operations.

Because the bill has significant bipartisan support, it is more than likely to pass in both the Senate and House, and ultimately be signed by the President. The legislation, formally referred to as the Diesel Emission Reduction Supplemental Environmental Projects bill, was introduced on October 4th. While the Senate and House versions are virtually identically, each may be read by going to the following locations:

For the Senate version, S. 2146, please go to  
[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s2146is.txt](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2146is.txt).

For the House version, H.R. 3754, please go to  
[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h3754ih.txt](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3754ih.txt).

#### **Comment Period Extended On Refinery Proposal**

The comment period for a U.S. Environmental Protection Agency (EPA) proposal to revise hazardous air pollutant emissions standards for petroleum refineries has been extended to December 28th.

As lifted from the August 27th NTAA Weekly Update about the EPA proposal, section 112 of the Clean Air Act (CAA) requires the Agency to complete two tasks regarding emissions of hazardous air pollutants. First, the EPA must promulgate national emission standards for hazardous air pollutants (NESHAP) for any “major” source that emits or has the potential to emit a single hazardous air pollutant (HAP) at a rate of 10 tons per year or a combination of HAPs at a rate of 25 tons per year. These technology-based standards must meet a minimum control level which varies between new and existing sources; for petroleum refineries, these standards were established in 1995. Second, the EPA must make a determination if existing standards need to be revised due to improved air pollution controls. In addition, the Agency must determine if the residual risk remaining beyond NESHAP requires additional standards to provide an “ample margin of safety” to adequately protect human health and the environment.

As part of its proposed Petroleum Refineries Risk and Technology Review Rule, the EPA is considering two separate options. First, the Agency is proposing to retain the existing NESHAP, claiming that the remaining risk to humans and the environment as a result of petroleum refineries is negligible enough that further controls for existing and new sources in unnecessary. Second, the Agency is proposing some additional controls, limiting them just to certain storage vessels and wastewater treatment units. For both options, the EPA is proposing improved work practices for detecting and repairing leaks from refinery cooling towers.

Please go to <http://www.epa.gov/ttn/atw/petrefine/petrefpg.html> to read the rule and associated documents.

#### **Special Thanksgiving Notice**

Due to the Thanksgiving holiday, there will not be a November 23rd NTAA *Weekly*

*Update.* Therefore, the next *Weekly Update* will be November 30th which will concern matters that occurred during that week in addition to other such matters of relative importance to tribes.

**The National Tribal Air Association compiles this update as a weekly series on air quality issues that affect tribes nationwide. If you have questions or comments on any of these issues or on the update itself, please contact either Bob Gruenig, Senior Policy Analyst, at 505/242-2175 ext. 103, e-mail [bgruenig@ntec.org](mailto:bgruenig@ntec.org), or Stephen Hartsfield, Program Director, at 505/242-2175 ext. 106, e-mail [shartsfield@ntec.org](mailto:shartsfield@ntec.org).**